



**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.**

**May 18, 2001**

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| <b>Joint Application of</b>                         | ) |                           |
|   | ) |                           |
| <b>AMERICAN AIRLINES, INC.</b>                      | ) |                           |
| <b>and THE TACA GROUP</b>                           | ) | <b>Docket OST-00-7088</b> |
|   | ) |                           |
| <b>under 49 U.S.C. 41308 AND 41309 for approval</b> | ) |                           |
| <b>of and antitrust immunity for agreement</b>      | ) |                           |

**ANSWER OF DELTA AIR LINES, INC.**

Delta Air Lines, Inc. ("Delta") strongly opposes the application of American Airlines, Inc. ("American") and the TACA Group ("TACA") (collectively the "Joint Applicants") for approval of and antitrust immunity for their alliance agreement. This agreement is a follow-on to the codeshare agreement between American and TACA that was approved in 1998, notwithstanding the serious concerns raised by the U.S. Department of Justice, Delta and other airlines. It was only through the imposition of significant conditions that the Department was able to rationalize approval of the American/TACA codeshare agreement.

The instant application would eliminate all of the competitive safeguards that the Department insisted upon to mitigate the anticompetitive effects of American/TACA codesharing. Not only

would the prior safeguards be eliminated, but antitrust immunity would expressly empower American and TACA to fix prices, pool revenues, coordinate service and capacity, and function generally as if they were a single merged carrier. Such a result would be harmful to competition and the public interest -- particularly at the critical Miami gateway.

Miami is by far the largest U.S. gateway to Central America. American and TACA are *the* principal competitors serving Miami-Central America routes, and the grant of antitrust immunity to this alliance would extinguish all meaningful competition for Miami-Central America passengers. As correctly observed by the Department: "Since no carrier besides American has a hub at Miami, it is unlikely that any other carrier could mount effective nonstop service in any of these Miami-Central America markets, even if the Joint Applicants charged supra-competitive prices or reduced service below competitive levels." Order 97-12-35 at 26.

For the reasons discussed below, the grant of antitrust immunity to American and TACA should be denied because it is anticompetitive and inconsistent with the public interest. If, however, the Department is inclined to grant antitrust immunity in this case, the Department

must ensure that Miami-Central America nonstop routes are not included within the scope of any grant of antitrust immunity.

**I. Under the unique circumstances of this case, antitrust immunity is anticompetitive and should be denied.**

The Department's public interest and competition analysis of the American/TACA codeshare correctly concluded that the proposed arrangement would "further solidify American's position as the dominant carrier in Central America" and "raises serious concerns regarding future competition in the affected markets." Order 97-12-35 at 2, 26. Those same concerns apply in spades to the Joint Applicants' instant request for antitrust immunity.

Contrary to the Joint Applicants' assertions, there are few, if any benefits to allowing an effective merger between the two primary competitors in the U.S.-Central America region. The Joint Applicant's claim that the alliance is intended to stimulate more vigorous competition and expand consumer choice (page 12) is belied by

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Delta fully concurs with the Department of Justice's findings that the alleged benefits of the American/TACA codeshare alliance are "very slight" and that even with the Department's competitive safeguard conditions imposed on the existing codeshare, there are substantial risk to competition and the public interest. Those concerns apply with much greater force to the proposed grant of antitrust immunity to the two primary U.S.-Central America competitors:

- "The claimed efficiency benefits that are unique to this transaction *are very slight* . . ." DOJ Comments at 2.
- "This almost exclusively horizontal American/TACA agreement *stands in stark contrast to the largely end-to-end agreements that the Department has approved in the past*. Most significantly, the Delta/Swissair/Sabena/Austrian Airlines, United/Lufthansa, American/Canadian and United/Air Canada alliances involved fewer overlapping city pairs, and significantly greater opportunities

for the code-share partners to extend the reach of their networks beyond foreign gateways.” DOJ Comments at 11.

- “As recognized by the Department, *the risk of harm* to overlapping city-pair markets in this case *is not trivial*. In the overlapping nonstop Miami-Central American city pairs, American and TACA have combined market shares ranging from a low of 88% to a high of 100%.” *Id.*
- “If this Agreement held out the potential for conferring pro-competitive benefits on large numbers of passengers, it might be appropriate to approve it subject to condition crafted to minimize the accompanying competitive problems. But, the Department should recognize that it cannot eliminate the risks to competition with any conditions that it might impose, and *this agreement does not offer significant pro-competitive efficiencies*.” *Id.*

American’s empire-building tactics in Latin America have even attracted attention outside the core group of industry participants and government regulators. As chronicled by the Wall Street Journal at the time of the initial American/TACA codeshare, American has embarked on a conscious strategy to build dominance and extinguish competition in the region. *See, Yankee Aggressor - How American Airlines Is Building Dominance in Latin America*, Wall Street Journal (January 9, 1998). The Journal article details how American has used strong-arm tactics to ensnare Latin American carriers such as the TACA Group: “[American] threatens, cajoles carriers in region to ally with it.” *Id.* The Department

should not further abet American's anticompetitive tactics by giving American permission to accomplish a virtual merger with TACA.

Indeed, based on the Department's initial findings on the codeshare agreement, there are serious questions as to whether the alliance should be permitted to continue in its present codeshare-only form -- let alone be expanded to include antitrust immunity. In approving the limited codeshare arrangement, the Department specifically stated that TACA's failure to enter into a competitive codeshare agreement with another U.S. airline -- which TACA has not done -- would be considered a negative factor in deciding whether the American/TACA arrangement should be renewed. See Order 97-12-35 at 29 ("in reviewing any request for renewal of this proposed authority, and in its ongoing review of the conduct of these approved arrangements, the Department will consider the competitive structure of the market at that time, and consider whether the TACA Groups' failure to engage in code-share relationships with additional U.S. carriers has contributed to a market structure that does not continue to support the approval of a code-share arrangement [with American]. . .")

Not only has TACA failed to enter into a codeshare relationship with another U.S. carrier, but TACA's decision to seek antitrust

immunity with American makes it abundantly clear that the intent of this proposed arrangement from the outset was and remains to integrate the American and TACA carriers as a single entity and exclude competitors from U.S.-Latin America routes, and at the critical Miami gateway in particular. The Department's efforts to ensure healthy competition through multiple codeshares at Miami has been frustrated, and the American/TACA codeshare renewal conditions stated by the Department in Order 97-12-35 have not been met.

Moreover, the proposed alliance agreement seeks to reassert the same exclusivity clause that the Department found to be anticompetitive and contrary to the public interest in the prior codeshare proceeding:

[w]hile exclusivity clauses are not uncommon, in the circumstances of this case it has the potential for anti-competitive results not present in other cases. For example, American is the dominant carrier at Miami, the present primary U.S. gateway to Central America. The TACA Group Affiliates represent all of the major scheduled carriers in the Central America region. The Joint Applicants' share of the U.S.-Central America market is almost 68 percent of the passengers transported. The Joint Applicants provide all the connecting services in each of the overlap markets. . . . Therefore, the potential that any other qualified carrier would be particularly interested in providing competing services in the region would be reduced, absent the opportunity of forming a relationship with the TACA Group. . . . For these reasons, we tentatively find it in the public interest to prohibit the implementation of the [exclusivity clause] of the Alliance Agreement. Order 91-12-35 at 29.

Those same concerns apply to the alliance agreement at issue, and, if the Department wants to maintain any hope of injecting a viable new codeshare competitor to the region, the Department should prohibit enforcement of any exclusivity provision in any marketing agreements, including codeshare and frequent flyer programs.

**II. Miami-Central America routes must be carved out of any grant of antitrust immunity.**

For the reasons explained above, the American/TACA request for antitrust immunity should be denied outright. However, under any analysis, it is vitally important that nonstop Miami-Central America routes be carved out from any grant of antitrust immunity.

The importance of the Miami gateway and the need to maintain viable competition there cannot be overstated. Miami is the number one U.S. gateway and U.S. origin/destination traffic point for all of Latin America.

Furthermore, given the unique importance of Miami to customers in Central America, if American and TACA were able to coordinate fares, discount levels and Miami-Central America services with one another, they would be able effectively to leverage this strength with corporate customers, travel agents, tour operators and other distributors.

As a result of their shared dominance in these crucial markets, any coordination between American and TACA for Miami-Central America services would weaken the ability of other carriers to compete effectively against the alliance for U.S.-Central America traffic to other regions of the United States. Thus, it is important for the Department to deny antitrust immunity for the Miami overlap routes not only to ensure adequate competition for local passengers, but also to ensure the continuing ability of Delta and other U.S. carriers to compete for U.S.-Central America traffic in other regions of the country.

American and TACA control the Miami gateway, and, as recognized by the Department, American's hub strength at Miami makes it extremely unlikely that any carrier would enter the marketplace, "even if the Joint Applicants charged supra-competitive prices or reduced services below competitive levels." Order 97-12-35 at 26. In addition, an immunized relationship between American and TACA would close the door to any other carrier seeking to establish a competitive marketing presence through a codeshare with TACA at Miami, as envisioned by the Department's initial approval of the AA/TACA codeshare.

As noted by the Department of Justice in its prior comments: "In the overlapping nonstop Miami-Central American city-pairs, American

and TACA have combined market shares ranging from a low of 88% to a high of 100%.” DOJ Comments at 11. The proposed immunized agreement would allow American and TACA to leverage American’s hub strength at Miami, together with the Joint Applicant’s overwhelming combined share of local traffic. This led the Justice Department to conclude that there was a substantial risk of harm on to consumers on Miami-Central America routes. *Id.*

The competitive situation for Miami-Central America service is unique and readily distinguishable from the competition that exists between the United States and most other international regions. For example, between the United States and Europe there are competing network alliances that provide numerous alternatives for consumers and that discipline nonstop services by any one alliance on a particular city-pair. The exception the general rule in the transatlantic marketplace is London Heathrow, where excessive backhauls from the Continent limit the ability of other carriers to provide attractive connecting options. Likewise, no viable connecting alternatives exist that would provide an effective disciplining mechanism to American/TACA at Miami.

The unique geographic and competitive situation at Miami makes it imperative that the Department exclude antitrust immunity for *all* services

on Miami-Central America nonstop routes. As noted by the Joint Applicants themselves, “[t]he geographic distance between the United States and these five Central American cities is shorter than on many domestic routes. Each of them is as close or closer to Miami than is New York City.” Joint Application at 22.

It is precisely for this reason that neither Delta’s Atlanta hub, nor any other competitors’ hub, can provide effective competitive discipline to American/TACA for Miami-Central America local passengers. It is inconceivable that many local passengers would be willing to endure a 600 mile 180 degree backhaul (flying 1200 miles out of the way) for an 1100 mile journey. Accordingly, the Department’s traditional remedy of carving out only certain F and Y nonstop fares for time-sensitive travelers will not work. Because of the extreme inconvenience of alternate routings, the Department needs to seek to ensure that *all* Miami-Central America passengers will have competitive service options vis-à-vis American and TACA.

In these circumstances, the Department’s previous determination to limit cooperation between American and TACA for Miami-Central America local flights is essential. The Department has already found that without appropriate conditions, American/TACA cooperative services

“may result in certain anti-competitive outcomes in [the Miami overlap] markets, contrary to the public interest.” Order 97-12-35 at 26. In imposing a blocked-space codeshare condition, the Department specifically found that:

“these proposed conditions are necessary to guarantee that American and the TACA Group continue vigorous head-to-head competition in these specific markets. If each carrier is required to market its portion of an aircraft as best it can, once the blocked-space arrangements are made, each will also have a strong incentive to fill those seats, without the potential dilution of competition that may result from provisions permitting unsold seats to be exchanged.” Id. at 30 (emphasis added).

The Department's condition was intended to “erect a wall of independence around each of the applicant's marketing of services in these markets.” Id.

The Joint Applicants have now requested complete antitrust immunity – and for the Department to do away with the conditions on Miami-Central America routes, citing automation issues and programming costs. *See*, Joint Response, dated February 28, 2001 at Exhibit 1. American and TACA concede that it is possible for them to develop the necessary software to implement the Department's blocked space condition, but that it would be burdensome and costly to do so. *Id.*

If the Joint Applicant's are allowed to proceed with any further integration of their alliance, the requirement for appropriate conditions on

the Miami routes becomes even more imperative to ensure that the Joint Applications will have the appropriate incentives to continue to compete on the critical Miami overlap routes. It is simply not an option for the Department to trade this vital public interest need for the commercial expedience of the Joint Applicants.

### **Conclusion**

The proposed antitrust immunized alliance between American and TACA has the potential for significant consumer harm and adverse public interest consequences. There are no substantial countervailing public interest benefits, and the Joint Application should be rejected outright. If, nonetheless, the Department determines to allow any further integration between these two primary competitors, it is vitally important that Miami-Central America routes be excluded from any grant of antitrust immunity and that the Department maintain appropriate conditions to preserve competition on the Miami-Central America overlap routes. The Department should also seek to prop open the door for a new regional codeshare competitor by prohibiting the enforcement of any exclusivity

clause relating to marketing agreements, codesharing, or frequent flyer programs.

Respectfully submitted,

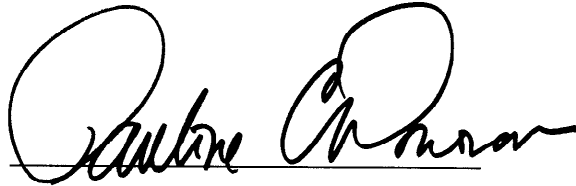
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## CERTIFICATE OF SERVICE

I hereby certify that I have, this 18th day of May, 2001, served the foregoing Answer of Delta Air Lines, Inc., upon those persons listed on the attached service list by depositing copies thereof in the United States mail, first class, postage prepaid.

A handwritten signature in black ink, appearing to read "Pauline C. Donovan", written over a horizontal line.

Pauline C. Donovan

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